

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD

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UNITED STATES COAST GUARD

vs.

License No. 779158

LAWRENCE P. ABATIE

Respondent

Docket No. CG S&R 01-0028

Case No. PA00001793

DECISION AND ORDER

BEFORE:

ARCHIE R. BOGGS  
Administrative Law Judge  
Eighth Coast Guard District

APPEARANCES:

FOR THE COAST GUARD  
LTJG William N. DeLuca, and  
LT Michael J. Simbulan  
United States Coast Guard  
Marine Safety Office Honolulu  
433 Ala Moana Boulevard, Room 1  
Honolulu, Hawaii 96813-4909

FOR THE RESPONDENT  
Ramon J. Ferrer, Esquire  
Suite 405  
1975 Vineyard  
Wailuku, Hawaii 96793

PRELIMINARY STATEMENT

In discharge of its duty to promote safety of life and property at sea, the United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Merchant Mariner's License number 779158 issued to Respondent Lawrence P. Abatie.

This action is brought pursuant to the legal authority contained in 46 U.S. Code Chapter 77 and its underlying regulations codified at 46 C.F.R. Parts 5 and 10. In a complaint dated January 11, 2001, the Coast Guard charged Respondent with being convicted of an offense that would prevent the issuance or renewal of a license in violation of 46 U.S.C. § 7703(2) and Misconduct under 46 C.F.R. § 5.27. As additional regulatory support for the complaint, the Coast Guard cited 46 C.F.R. § 5.61(b), and 46 C.F.R. §§ 10.201(i)(3).

The factual allegations in the complaint are:

"On September 21, 2000, the Respondent was convicted of Driving under the Influence of an Intoxicating Substance by the Hawaii District Court of the Second Circuit."

The Respondent filed an answer admitting the jurisdictional and factual allegations, and requested a hearing on the proposed sanction. Attached to Respondent's answer was a supplemental document entitled "Defenses to the Complaint" in which he asserted eight (8) claims in support of a sanction of less than revocation. In support of his claim he stated:

1. The intoxicating substance was alcohol, and he objects to the Coast Guard's characterization in the complaint that Respondent was driving under the

influence of an "intoxicating substance" since the conviction resulted from driving under the influence of alcohol.

2. The conviction represents misconduct as defined in 46 C.F.R. § 5.27.
3. The complaint does not state grounds upon which relief may be granted.
4. Since Respondent was not operating a vessel at the time of the arrest, nor was he scheduled to operate a vessel, he did not engage in misconduct detrimental to the operation of a vessel.
5. 46 C.F.R. § 5.61 does not include being under the influence of alcohol as an act for which revocation is sought.
6. Respondent's current enrollment in an alcohol or drug abuse rehabilitation program should serve as a mitigating factor under 46 C.F.R. § 10.201(i), if applicable, that would prevent revocation of his license.
7. Commandant Decision on Appeal No. 2535 (SWEENEY), which sets out the standard for cure, should apply since the violations are similar.
8. The predecessor to 46 U.S.C. § 7703 was remedial, not penal in nature and so Respondent's case should be treated as one requiring remedial measures, such as SWEENEY cure rather than punishment through revocation.

A hearing was conducted on March 1, 2001 in Maalaea, Maui, Hawaii, in accord with the Administrative Procedure Act, as amended and codified at 5 U.S.C. §§ 551-559, and Coast Guard procedural regulations, 33 C.F.R. Part 20.

Lieutenant (junior grade) William N. DeLuca and Lieutenant Michael J. Simbulan entered appearances on behalf of the Coast Guard. Mr. Abatie was represented by professional counsel, Ramon J. Ferrer.

After opening statements by both sides, the Coast Guard submitted two (2) exhibits:

IO Exhibit 1 – a Hawaiian Second Circuit District Court calendar memorializing the motor vehicle violation hearing

IO Exhibit 2 – an ALJ Decision by Thomas E. McElligott, USCG v. Lawrence P. Abatie, Docket No. 00-0460, issued October 31, 2000, requiring Respondent to comply with SWEENEY guidelines or otherwise his license would be revoked.

The Respondent testified in his own behalf and he introduced into evidence the testimony of David W. Hudson, owner and sole shareholder in Finest Kind Sportsfishing, Inc., who attested to Respondent's good character and on-the-job performance. The Respondent also introduced four (4) exhibits into evidence to support his claim for a less severe than revocation sanction.

Those exhibits are as follows:

Respondent Exhibit A - a "Top Lahina Captains" article Hawaii Fishing News September 2000.

Respondent Exhibit B – a letter from the Hawaii State District Court for the Second Circuit concerning a rehabilitation program.

Respondent Exhibit C – a restored driver's dicense issued to Lawrence P. Abatie.

Respondent Exhibit D – a letter from a substance abuse counselor concerning Mr. Abatie's participation in Alcoholics Anonymous.

After careful review of the facts and applicable law the allegations are found proved based on Respondent's admission and the reliable and credible evidence adduced at the hearing. However, for reasons stated herein, I decline to revoke Respondent's license. Instead, his license will be suspended outright for an additional six (6) months following completion of the SWEENEY cure process ordered in United States Coast Guard v. Lawrence P. Abatie, Docket No. 00-460, issued on October 31, 2000. Respondent will also be required to show successful completion of a bona fide

alcohol abuse rehabilitation program and active and continued participation in such a program.

#### FINDINGS OF FACT

1. Respondent Lawrence P. Abatie is a charter boat fishing captain who has held a Coast Guard license for approximately nine and a half (9 1/2) years during which time he has never been involved in any marine related accidents resulting in personal injury or property damage. (*Transcript 39-42*).
2. Respondent is the holder of license number 779158, which is currently on good faith deposit with the Coast Guard pending completion of the SWEENEY cure process ordered in United States Coast Guard v. Lawrence P. Abatie, Docket No. 00-460, on October 31, 2000. In that case, the presiding administrative law judge found that Respondent violated 46 U.S.C. § 7704(c) by testing positive for marijuana during a reasonable cause drug test performed on June 26, 2000. The judge ordered the Respondent to notify the Coast Guard of his enrollment in an approved drug rehabilitation program in accordance with SWEENEY guidelines within thirty (30) days from receipt of the decision and order or otherwise his license would be revoked. (*IO Exhibit 2*).
3. In November 2000, Respondent attempted to comply with the order issued in Abatie case docket number 00-460 by enrolling in a drug rehabilitation program with Hina Mauka. However, upon the Coast Guard's review of the program it was determined that Hina Mauka does not satisfy the SWEENEY requirements.

Consequently, Respondent did not enroll in a Coast Guard approved drug rehabilitation program until January 31, 2001. (*Transcript 26*).

4. While the Abatie case docket number 00-460 was pending adjudication and prior to the issuance of the judge's order requiring SWEENEY cure, Respondent was charged with driving under the influence of an intoxicating substance (DUI) (i.e., alcohol) to which he entered a plea of "no contest." Based on his plea, the Respondent was convicted by the District Court of the Second Circuit, State of Hawaii, on September 21, 2000. The court imposed a \$25 fine and suspended Respondent's driving privileges for 30 days, during which time he was required to undergo a complete psychological examination, attend seven (7) Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) one hour meetings, and attend seven (7) driver's education classes. (*IO Exhibit 1; Respondent's Exhibit B; Transcript 17-19, 47*).
5. Upon complying with the Hawaii District Court's order, the Respondent's driving privileges were restored and his driver's license was renewed. (*Respondent's Exhibit C*).
6. The Respondent testified that the September 21, 2000 conviction was his first DUI offense.
7. At the time of the hearing the Respondent was in the process of completing the SWEENEY cure process ordered by the administrative law judge in the prior case.
8. Respondent currently participates in AA and attends several meetings a week. (*Transcript 37; Respondent's Exhibit D*).

OPINION

The facts of this case are not in dispute. The Respondent admitted to being convicted of driving under the influence of an intoxicating substance (i.e., alcohol) by the Hawaii Court. This is sufficient to support a finding that the allegations in the complaint are proved. See Appeal Decision 2458 (GERMAN). The only issue of concern is the nature of the sanction to be imposed against Respondent's license. The Coast Guard urged that revocation is the most appropriate sanction and the fact that he is currently undergoing Sweeney cure pursuant to the prior decision serves as an aggravating factor. In response, the Respondent contended that a lesser sanction of not more than 4 months suspension should be imposed since:

- a) Except for undergoing SWEENEY cure and the DUI conviction, he has not been convicted or committed any offense involving alcohol or drugs;
- b) He is an outstanding captain with an excellent safety and employment record;
- c) He is currently enrolled in a rehabilitation course as required by SWEENEY, he regularly attends Alcoholics Anonymous meetings, and his driver's license privileges have been restored because he complied with all requirements following his DUI conviction; and
- d) He voluntarily deposited his license with the Coast Guard during the hearing in the prior case, and has not had use of the license for the past 8 months.

The Respondent correctly notes that revocation is not mandatory under Section 7703 of Title 46 of the United States Code, which provides:

A [Coast Guard issued] license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder--

\* \* \*

- (2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document; or
- (3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401 note).

In determining the appropriateness of a sanction, the administrative law judge has exclusive authority and discretion. See 46 C.F.R. § 5.569(a); see also Appeal Decision 2427 (JEFFRIES), Appeal Decision 2452 (MORGANDE). Except for acts or offenses for which revocation is mandatory, the presiding administrative law judge may consider aggravating or mitigating factors that include:

- 1) Remedial actions which have been undertaken independently by the Respondent;
- 2) Prior record of the Respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and
- 3) Evidence of mitigation or aggravation.

See 46 C.F.R. § 5.569(b).

While Respondent's DUI conviction, which occurred while awaiting hearing for violating 7704 and for which he is currently completing cure pursuant to the order issued in the prior Abatie case serves as an aggravating factor, his license will not be revoked. The undersigned is not insensitive to the fact that this was Respondent's first



DUI conviction, he has demonstrated substantial involvement in AA, and his driver's license has been returned. Accordingly, a less severe sanction will be issued and Respondent will be required to complete a Coast Guard approved alcohol abuse rehabilitation program and maintain active participation in a bona fide alcohol abuse monitoring program as required in 46 C.F.R. § 5.901(e). Enrollment in these two programs is subject to the Coast Guard's approval.<sup>1</sup>

2. There is one further matter that should be addressed. The Coast Guard relies on 46 U.S.C. § 7703(2) as statutory authority governing this case. Section 7703(2) of Title 46 of the United States Code authorizes suspension or revocation of a Coast Guard issued license, certificate of registry, or merchant mariner's document if the holder of such credentials "is convicted of an offense that would prevent the issuance or renewal of [said credentials]." While a DUI conviction may preclude the issuance of a license, (46 C.F.R. § 10.201(i)(3) and (j)); the statutory authority, which is most appropriate given the facts and circumstances of this case, is subsection 3 of Section 7703. See generally Appeal Decision 2608 (SHEPHERD) (rejecting Respondent's argument that his DUI conviction cannot form the basis of a charge until he seeks to have his license and document renewed and holding that 46 U.S.C. § 7703(3) applies to the DUI conviction because the offense occurred within three-years preceding the suspension and revocation proceeding).

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<sup>1</sup> Although 46 C.F.R. § 5.901(e) governs issuance of new licenses, certificates, or documents following revocation or surrender, it forms a sound and reasonable basis upon which to craft a viable order in this case. See generally Appeal Decision 2535 (1992), reversed on other grounds Kime v. Sweeney, NTSB Order No. EM-165 (1992), followed Appeal Decision No. 2546 (SWEENEY) (1992), appeal denied Kime v. Sweeney, NTSB Order No. EM-176 (1994).

The plain language and legislative history of 46 U.S.C. § 7703 makes clear that subsection 3 was enacted to primarily deal with motor vehicle offenses (such as driving under the influence of alcohol) and subsection 2 was enacted to deal with other criminal offenses that may prevent the issuance of a license. See Oil Pollution Act of 1990 (OPA 90), H.R. Conf. Rep. No. 101-653, § 4103(1990), *reprinted in* 1990 U.S.C.C.A.N. 779; see also, OPA 90, S. Rep. No. 101-99, § 102 (1989), *reprinted in* 1990 U.S.C.C.A.N. 749 (stating that "Subsection (b) [authorizes suspension or revocation of Coast Guard credentials] if, among other conditions, the holder has been convicted of a serious criminal offense, or specified motor vehicle driving offenses . . ."). To fall within the purview of subsection 3, the offense for which Respondent is convicted need not be listed on the National Drivers Register (NDR), it need only be an offense that is described in section 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401 note).

A conviction for operating a motor vehicle under the influence of alcohol is an offense described under section 205(a)(3)(A) of the National Driver Register Act which requires a state to report to the Secretary of Transportation, 23 U.S.C. 401 note (Reports by Chief Driver Licensing Officials); 49 U.S.C. § 30304(a)(3)(A); Appeal Decision 2608. The mere fact that the State of Hawaii had not yet listed the offense on the NDR did not preclude the Coast Guard from appropriately citing 7703(3). This error, however, is harmless and any deficiencies in the Coast Guard pleadings were cured because Respondent had actual and adequate notice of the issues that were fully litigated. See generally Appeal Decision 2393 (STEWART).

### ULTIMATE FINDINGS<sup>2</sup>

1. Respondent, Lawrence P. Abatie, and the subject matter of this hearing are within the jurisdiction of the United States Coast Guard in accordance with Title 46, United States Code 7703.
2. At all relevant times on September 21, 2000, Respondent Abatie was the holder of License Number 779158, which is currently on good faith deposit with the Coast Guard pending Respondent's completion of the SWEENEY cure process.
3. Respondent Abatie admits that the Hawaii District Court of the Second Circuit convicted him on September 21, 2000 of driving under the influence of an intoxicating substance (i.e., alcohol).
4. Although the Coast Guard should have relied on 46 U.S.C. § 7703(3) as the most appropriate statutory authority, the error is harmless because 46 C.F.R. § 10.201(b), (i), and (j) establishes that a DUI conviction is an offense that may preclude the issuance or renewal of a license.

### CONCLUSION

The Coast Guard has established through his admission that Lawrence P. Abatie, was convicted on September 21, 2000 of driving under the influence of an intoxicating substance by the Hawaii District Court of the Second Circuit. This constitutes a

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<sup>2</sup> On March 26, 2001, Respondent, by and through counsel, filed a post-hearing brief, and the Coast Guard filed its proposed findings of fact and conclusions of law on March 29, 2001. The Coast Guard only enumerated its proposed findings of fact, but failed to enumerate the proposed conclusions of law and Respondent failed to enumerate any of its proposed findings of fact and conclusions of law in its post-hearing brief. As such, rulings are only made on proposed findings that were properly enumerated. Said rulings are attached to this decision.

violation of 46 U.S.C. § 7703(2) and the underlying regulations. After careful review of the facts and circumstances of this case, it is determined that outright suspension coupled with Coast Guard approved alcohol rehabilitation and alcohol monitoring programs are the most appropriate order.

### ORDER

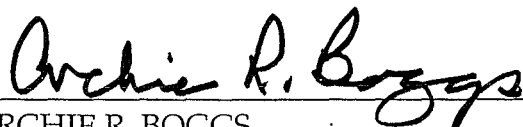
License Number 779158 issued to you by the United States Coast Guard is hereby suspended outright for a period of six months commencing following your satisfactory compliance with the previous Order dated October 31, 2000, by Administrative Law Judge McElligott. During this period of suspension, your license will remain in the custody of the Coast Guard. Said license shall be returned to you no earlier than January 10, 2003, subject to the satisfactory completion of a Coast Guard approved alcohol abuse rehabilitation program and your continued participation in a Coast Guard approved alcohol abuse monitoring program.

Failure to comply with this Order or subsequent violations of any law or regulation administered and enforced by the Coast Guard may result in your license being revoked.

Delivery of this Decision and Order on you or your counsel will constitute service and will serve as notice to you of your right to appeal, the procedures for which are set forth in Attachment A and made part of this Order.

Absent an appeal taken by either party, this decision shall become the final action of the Coast Guard 30 days after the date of issuance as provided in 33 C.F.R. § 20.1101.

Done and dated this 30 day of May, 2001, at New Orleans, Louisiana

  
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ARCHIE R. BOGGS  
Administrative Law Judge